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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WINDRUSH APARTMENTS, LTD. d/b/a WINDRUSH APARTMENTS, LEO MANAGEMENT COMPANY, THOMAS L. WILLIAMS, and TENA McGILL,

Petitioners

vs.

DERREAN GRESHAM and METRO FAIR HOUSING SERVICES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WRIT OF CERTIORARI

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WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the Court of Appeals err as a matter of law in holding that, when seeking a preliminary injunction, the irreparable injury requirement which must be fulfilled can be presumed from a showing of a substantial likelihood that illegal discrimination has occurred?

2. Did the Court of Appeals err as a matter of law in holding that, when seeking a preliminary injunction, if it is shown that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support a preliminary injunction remedying those violations?

3. Did the Court of Appeals err in failing to make the injunction specific and clear in its context so as not to be too vague for compliance?

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The caption contains all of the names of the parties in this lawsuit.

This is the original designation of corporate relationships.

LEO MANAGEMENT COMPANY is not owned by any parent corporation.

LEO MANAGEMENT COMPANY does not have any ownership interest in any subsidiaries.

LEO MANAGEMENT COMPANY does not have any affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 730 F.2d. 1417 (1984).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on the 27th day of April, 1984 and a copy thereof is appended to this Petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

42 U.S.C. § 1982, § 1437(f), § 3604; 24 C.F.R. 200.620(a), 200.620(c), 200.625, 110.30; F.R.C.P. 65. [The pertinent provisions are set forth in Appendix D.]

STATEMENT

The current lawsuit was brought pursuant to 42 U.S.C. § 1981 and § 1982 and 42 U.S.C. § 3604 along with the Thirteenth Amendment to the Constitution of the United States. Derrean Gresham is a black citizen of the United States. Metro Fair Housing Services is a non-profit corporation devoted to promoting integrated housing.

On or about January 31, 1983, the Plaintiff, Derrean Gresham, made application for a Section 8 apartment at Windrush Apartments. Windrush Apartments is a privately owned complex containing approximately 202 apartments of which 41 are designated as Section 8 housing pursuant to 42 U.S.C. § 1437(f). Defendant Windrush Partners, Ltd. owns and operates Windrush Apartments. Leo Management Company manages the apartments. Thomas L. Williams is the President of Leo Management Company. De-

fendant Tena McGill is the Resident Manager of Windrush Apartments and has been since January 15, 1983.

The Plaintiff Gresham did not receive one of the Section 8 apartments for which she applied. She then contacted Metro Fair Housing Services in response to her being placed upon a waiting list, instead of receiving an apartment. Metro Fair Housing Services then conducted a series of tests to determine if Windrush Apartments was engaged in racially discriminatory housing practices.

On August 8, 1983, Plaintiffs filed suit in the United States District Court for the Northern District of Georgia, Atlanta Division, and sought a preliminary injunction to prohibit the Defendants from engaging in discriminatory housing practices. On March 24 and 25, 1983, a preliminary injunction hearing was held at which time evidence was presented by Plaintiffs and Defendants. On the 31st day of May, 1983, the District Court entered an Order which granted a preliminary injunction against the Defendants from engaging in certain practices.

A timely appeal was made of the Court's Order of May 31, 1983 to the Eleventh Circuit Court of Appeals. One of the grounds for the appeal was that the District Court erred in presuming the requisite "irreparable injury" necessary for the issuance of preliminary injunction based solely upon the violation of certain statutes. The second ground for appeal was whether or not the injunction was so overbroad in some respects and so lacking in specificity in others, that it denied the Defendants procedural due process because of its lack of notice of potential violations of the preliminary injunction. The Court of Appeals held that the District Court did not err in finding the irreparable injury necessary for the issuance of a preliminary injunction. The Court of Appeals modified the injunction to provide greater specificity.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Northern District of Georgia had jurisdiction of this action pursuant to 28 U.S.C. Section 1343(4) and 42 U.S.C. Section 3612.

ARGUMENT

The decision of the Court of Appeals has jeopardized the procedural due process rights of the Petitioners. In its justifiable zeal to protect the statutory rights of fair housing of the Respondents, the Court of Appeals failed to adequately consider the procedural due process rights of the Petitioners. Other Circuit courts have rendered opinions in this area concerning the burden of proof of a movant when seeking a preliminary injunction, and the resultant contents of a preliminary injunction to cease any alleged misconduct. Review by this Court would help resolve important federal questions in this area.

In the case of *sub judice*, the Eleventh Circuit ruled that the District Court's finding of violations of the Federal Fair Housing Act, specifically 24 C.F.R. 200.620(a)(c), 200.625 and 110.30, alleviated the Plaintiff from the burden of showing an irreparable harm. It is necessary to note that the District Court's ruling did not deal with any constitutional claims of the Respondents (f.n.2 of District Court's original Order). The District Court also found that race was not a significant factor in the alleged denial of Section 8 housing. The important question is whether or not technical statutory violations should in themselves be sufficient to eliminate the requirement of showing an irreparable harm for the issuance of a preliminary injunction which goes further than remedying those specific technical statutory violations.

The District Court cited *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part*, 473 F.2d. 910 (6th Cir. 1973)(mem). In that case, the District

Court of Ohio, when holding an injunctive hearing concerning violations of Fourteenth Amendment constitutional rights of the Plaintiffs held that irreparable harm could be presumed if a substantial likelihood of success of the merits of the housing discrimination claim was shown. That case dealt with a constitutional claim and not with statutory violations, as in the case at hand. The Tenth Circuit, in the case of *Atchison, Topeka and Santa Fe Railroad Company v. Lennen*, 640 F.2d. 255, 259 (10th Cir. 1981) ruled that violation of a federal statute was sufficient to presume irreparable injury. Thus, both the 10th and 11th Circuits have stepped aside from normal injunctive procedure and created new federal law.

Normally, in order for a temporary injunction to be granted, a substantial likelihood of success on the merits and an irreparable injury are two of the four requirements for said injunction. *Shatel Corporation v. Mao Ta Lumber and Yacht Corporation*, 697 F.2d. 1352, 1354-55 (11th Cir. 1983). F.R.C.P. 65 is also in accord with the fact that four requirements must be shown. Doing away with the irreparable harm requirement for preliminary injunctions should not be accomplished without, at the same time, having direction from the Court as to which specific violations from which irreparable harm will be presumed to flow. If irreparable harm can be presumed from the violation of a federal statute, then the injunctive relief should be geared specifically to remedy those particular violations. In the case at hand, while the injunctive relief, in portion, deals with the statutory violations, it goes further and makes a general statement concerning "active encouragement or solicitation" of white persons versus black persons. If irreparable harm is to be presumed from differentiation in solicitation, then the type of solicitation envisioned by the Court should be specifically defined so as to guarantee the Petitioners notice so that they will not inadvertently violate the Court's injunction.

Preliminary injunctions are in the nature of extraordinary relief and must be strictly complied with relating to "form and scope." *Commercial Security Bank v. Walker Bank & Trust Company*, 456 F.2d. 1352, 1354 (10th Cir. 1972). The form of an injunction must be consistent with the notice requirements of procedural due process. *U.S. Steel Corporation v. United Mine Workers of America*, 519 F.2d. 1236 (5th Cir. 1975), *rehearing denied*, 526 F.2d. 37, *cert. denied*, 428 U.S. 910 (1976).

In *Payne v. Travenol Laboratories, Inc.*, 565 F.2d. 895 (5th Cir. 1978), the Court of Appeals reversed the District Court's injunctive relief based upon the fact that the injunction was not specific enough. That injunction basically prohibited discrimination by the entities enjoined. The injunction in the case at hand, when it seeks to prohibit active solicitation of whites versus blacks, is equally vague. In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F.Supp. 198 (S.D. Texas, 1982), the Court also dealt with the requirement of specificity of an injunction to prohibit discrimination. In that case, the Court's injunction was highly specific and gave the entities enjoined procedural due process notice to which they are entitled.

No such specificity exists in the injunction issued in this case. The Petitioners are at their own peril in whatever activities they pursue that might subjectively be perceived as encouragement. The Constitutional rights of Petitioners should be given equal consideration; if not more, than the statutory rights of the Respondents.

CONCLUSION

New federal law has been created by the ruling of the Eleventh Circuit in this case. The Court needs to decide if this law is correct. Also, the scope of the injunction in this case is too broad for due process requirements and should be modified to prevent injustice.

APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

NO. 00-0000

WINDRUSH APARTMENTS, LTD. d/b/a WINDRUSH APARTMENTS, LEO MANAGEMENT COMPANY, THOMAS L. WILLIAMS AND TENA McGILL,

Petitioners,

vs.

DERREAN GRESHAM and METRO FAIR HOUSING SERVICES

Respondents.

The Court will enter my appearance as Counsel for WINDRUSH APARTMENTS, LTD. d/b/a WINDRUSH APARTMENTS, LEO MANAGEMENT COMPANY, THOMAS L. WILLIAMS, and TENA McGILL, who in this Court are Petitioners.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature : E. Speer Mabry III

Name : E. SPEER MABRY, III
Firm : HENNING, CHAMBERS & MABRY
Address : 2200 Century Parkway, N.E., Suite 825
City & State: Atlanta, Georgia 30345
Phone : (404) 325-4800

PROOF OF MAILING—AFFIDAVIT

I, E. SPEER MABRY, III, Attorney for WINDRUSH APARTMENTS, LTD. d/b/a WINDRUSH APARTMENTS, LEO MANAGEMENT COMPANY, THOMAS L. WILLIAMS and TENA McGILL, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 26th day of July, 1984, I deposited in a United States post office, located at 3104 Briarcliff Road, N.E., Atlanta, Georgia 30329, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Writ of Certiorari.

[Signed] E. Speer Mabry III

E. SPEER MABRY, III
Attorney for Petitioners
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Subscribed and sworn to before me at Atlanta, Georgia, this 24th day of July, 1984.

/s/ Sheila C. Watt
Notary Public Notary Public Georgia, State at Large
My Commission Expires Apr 4, 1986

PROOF OF SERVICE—CERTIFICATE BY BAR MEMBER

I, E. SPEER MABRY, III, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 26th day of July, 1984, I served copies of the foregoing Writ of Certiorari on the several parties thereto, as follows:

On Derrean Gresham and Metro Fair Housing Services, Respondents herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: Gordon L. Joyner, Esquire
Attorney for Derrean Gresham
759 Martin Luther King, Jr. Drive, N.W.
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[Signed]: E. Speer Mabry III

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APPENDIX

Appendix

A. Opinion of the United States Court of Appeals for the Eleventh Circuit dated April 27, 1984.

B. Order of the United States District Court for the Northern District of Georgia, dated May 31, 1983, ordering that the Petitioners herein be temporarily enjoined from certain activities.

C. Judgment of the United States Court of Appeals for the Eleventh Circuit, dated April 27, 1984 amending and affirming the Order of the United States District Court for the Northern District of Georgia.

D. Text of Statutes and Regulations involved.

Derrean GRESHAM and Metro Fair Housing Services, Plaintiffs-Appelless,

v.

WINDRUSH PARTNERS, LTD., d/b/a Windrush Apartments, Leo Management Company, Thomas L. Williams, and Tena McGill, Defendants-Appellants.

No. 83-8504.

United States Court of Appeals,
Eleventh Circuit.

April 27, 1984.

Nonprofit corporation devoted to promoting integrated houses and unsuccessful applicant for subsidized housing sued housing project, employees thereof and management company charging racial discrimination in housing practices. The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., issued preliminary injunction, and defendants appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that proof of existence of discriminatory housing practices is sufficient to permit a court to presume irreparable injury and absent any evidence in rebuttal the irreparable injury requisite for preliminary injunction is satisfied.

Affirmed.

1. Injunction 135

Although a preliminary injunction is extraordinary relief, the grant or denial of such relief is within the sound discretion of the district court.

2. Civil Rights 13.2(4)

Finding that apartment complex engaged in racial discriminatory housing practice of encouraging whites who inquired about subsidized housing but not encouraging blacks in similar situations was not clearly erroneous, for purpose of preliminary injunction in housing discrimination suit. National Housing Act of 1937, § 8, as amended, 42 U.S.C.A. § 1437f; 42 U.S.C.A. §§ 1981, 1982; Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; U.S.C.A. Const. Amend. 13.

3. Civil Rights 13.2(4)

When a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction remedying those violations. 42 U.S.C.A. §§ 1981, 1982; Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; U.S.C.A. Const. Amend. 13.

4. Civil Rights 13.2(1)

A court lacks authority to order innocent white tenants to vacate apartments to remedy housing discrimination against blacks or other minorities by the apartment manager. 42 U.S.C.A. §§ 1981, 1982; Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; U.S.C.A. Const. Amend. 13.

5. Civil Rights 13.2(4)

Because of the subtle, pervasive and essentially irremediable nature of racial discrimination, proof of the existence of discriminatory housing practices is sufficient to permit a court to presume irreparable injury, for purpose of injunctive relief, and equitable relief is appropriate absent any ev-

idence to rebut the presumption. 42 U.S.C.A. §§ 1981, 1982; Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; U.S.C.A. Const. Amend. 13.

John W. Gibson, James B. Deal, Atlanta, Ga., for defendants-appellants.

Gordon L. Joyner, Atlanta, Ga., for plaintiff below; on appeal, Gordon L. Joyner, Atlanta, Ga., for plaintiff-appellee Derrean Gresham.

Donald P. Edwards of Thomas, Kennedy, Sampson & Edwards, Atlanta, Ga., for plaintiff-appellee Metro Fair Housing Services.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

In this appeal we are asked to determine the propriety of a preliminary injunction that, in essence, requires defendants-appellants, who are the developers and managers of a large apartment complex in Decatur, Georgia, known as Windrush Apartments, to conform to the requirements of various fair housing laws. For the reasons stated herein we affirm entry of the preliminary injunction, with the minor modifications set forth below.

I. BACKGROUND

We set forth the facts in this case in detail, largely as they were found by the district court. On January 31, 1983, plaintiff-appellee Derrean Gresham, a black female, called the rental office at Windrush Apartments, a federally subsidized residential complex in Decatur, Georgia, to ask whether applications were being accepted for two bedroom,

"Section 8" apartments.[1] Defendant-appellant Tena McGill, the resident manager at Windrush, answered Gresham's call, told Gresham that she was too busy to talk right then, and told Gresham to call back later. Gresham called again later in the day and received a similar response from McGill. Gresham then told McGill that she would come in person to fill out an application.

At noon that same day Gresham went to the leasing office, accompanied by three other persons, all of whom were black. McGill offered all of them, including Gresham, applications for apartments at Windrush. Gresham and Carolyn Smith, one of the individuals with Gresham, asked whether one and two bedroom units were available under the Section 8 program. McGill said that such units were available. She did not offer to show them around the complex.

While at the leasing office Smith sought to apply for a one bedroom Section 8 apartment but was informed by McGill, after partially completing her application form, that the only one bedroom units still available were reserved for handicapped individuals. Gresham sought to apply for a two bedroom unit, after asking McGill whether that was an

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[1] Section 8 of the National Housing Act of 1937, as amended, 42 U.S.C. § 1437f, provides rent subsidies for low income families in apartment units constructed with the help of federal funds. Windrush Apartments contains 202 units, consisting of one, two and three bedroom apartments. Forty-one of these units are Section 8 apartments. The first "conventional," that is, non-Section 8, apartments were available for occupancy in October or November 1982. The first section 8 units were available for rental on February 1, 1983. As of March 24, 1983, 114 apartments, including both conventional and Section 8 units, had been rented. Of this total, 86 (75%) were rented to whites, 19 (17%) to blacks, and 9 (8%) to orientals. No separate breakdown was provided for the Section 8 units alone. The population of the complex's immediate neighborhood is estimated to be 90% white and 10% black.

appropriate size for a mother and two children. McGill told Gresham that her employment and income had to be verified by her employer prior to qualification for a subsidized apartment. McGill also told Gresham that she would have to submit her children's birth certificates, but McGill did not tell Gresham when to provide them. McGill did not offer to calculate the amount that Gresham's Section 8 rent would be at Windrush Apartments. McGill suggested that Gresham call if she did not receive notification regarding the status of her application within the following two weeks. On the next day, February 1, 1983, McGill mailed an employment verification form to Gresham's employer, the Stadium Hotel in Atlanta.

During the following two weeks, Gresham telephoned McGill several times to ask about the status of her application. McGill always replied that the processing was not completed and that she was waiting for information to be returned through the mail.

On February 17, 1983, Gresham once again called the rental office and asked whether she could do anything else to expedite her qualification for Section 8 housing. McGill told her that copies of the birth certificates of her children were needed for her file and that Gresham could bring them into the office. The two also discussed some missing forms—Gresham understood that her entire application had been lost, but McGill claims she told Gresham that only the employment verification form had been misplaced.

Gresham, under the impression that defendants had lost her rental application, went to the rental office that same day to complete another application. When Gresham arrived at the rental office, McGill informed her that she had found the application, but that now she needed birth certificates for Gresham and her two children, the telephone number of Gresham's previous resident manager, and one more employment verification form from her employer. Deviating from Windrush's ordinary procedure, Mc-

Gill gave Gresham the employment verification form to hand-carry to her employer. McGill advised Gresham, however, that the form had to be mailed in by her employer, not by Gresham. Gresham returned to the rental office later that afternoon to deliver the birth certificates and other information to McGill.

Gresham testified that when she returned with the birth certificates, McGill told her that the office's photocopying machine had broken down and that she could bring them back later. To facilitate the long-delayed completion of her application, however, Gresham told McGill to keep the birth certificates and that she would pick them up later. According to McGill, the photocopying machine was inoperable on that day because the rental office had just been moved from its previous location in the apartment model to the apartment clubhouse. At that time a proper electrical outlet for the machine had not yet been installed in the new rental office and McGill was unable to make copies of Gresham's children's birth certificates. Although McGill testified that she apologized for the apparent loss of the employment verification form, Gresham stated that she received no such apology. That same day the original employment verification form from Gresham's employer arrived in the mail in an envelope postmarked February 15, 1983. Apparently, the form had not been lost after all.

At about the same time in February, McGill became aware that there were ten applicants who had completed the required processing and were qualified for Section 8 two bedroom units, but that there were only five Section 8 two bedroom units available. McGill, who had no previous Section 8 housing experience, requested that her supervisor, Loretta Smith, who had experience with rental of Section 8 housing, select five persons or families for immediate tenancy in the available two bedroom Section 8 units.

Smith explained the selection procedure at the preliminary injunction hearing, stating that after Windrush had

received more applications than it had apartments in each category of Section 8 units—one, two, and three bedroom apartments—she reviewed all of the applications and other documents in each applicant's file, none of which indicated the applicant's race. She then selected for immediate occupancy the tenants who appeard to have the most favorable rental histories and credit references. After the initial tenants were selected, Smith created waiting lists for each category and sent "waiting list letters" to persons whose applications showed probable financial qualification for Section 8 assistance and whose verification forms had been received. Smith also sent waiting list letters to persons for whom employment verification forms or credit references had not been received, if those applicants appeared likely to qualify in view of the information available.

Applicants were placed on the waiting list in chronological order based on the initial date of submission of each application. Smith testified, however, that when a Section 8 unit becomes available in the future, she may select not the next application on the list, but the applicant whose rental history and credit references make the latter a "more acceptable" tenant.

On February 23, 1983, Smith selected the five applicants whom she deemed most qualified for the available two bedroom, Section 8 apartments and instructed McGill to notify them of their selection as Section 8 tenants. Of the five applicants selected, one was black and four were oriental. The racial makeup of the persons who were not selected is not known. Gresham, who was not among those selected, was notified by telephone that same day that she had been placed on the waiting list for two bedroom apartments. A waiting list letter was mailed to Gresham on March 11, 1983.

Although Gresham was not notified of her failure to be selected as a Section 8 tenant at Windrush until February 23, her experience in attempting to complete her applica-

tion on February 17 convinced her that she was being given the "run-around" by McGill. As a result, Gresham contacted plaintiff-appellee Metro Fair Housing Services (Metro) on February 17. Metro is a nonprofit corporation devoted to the promotion of integrated housing in metropolitan Atlanta. Metro operates a housing counseling service and a referral service, as well as investigates complaints concerning housing discrimination.

Following Gresham's complaint, Metro sent various white and black testers, first to "test" and then to "audit" Windrush Apartments for racially discriminatory housing practices. Testing and auditing are common methods used by Metro to investigate claims of fair housing violations. Metro conducts a test for possible race dicrimination by selecting a tester whose race is different from that of the person who has complained of discrimination. Metro instructs the tester to give particular information similar to or the same as the credentials of the complainant. The tester then applies for the same housing and reports the results to Metro, who compares the report with the complainant's story to determine whether the latter was denied housing on racial grounds. Auditing is a form of testing commonly employed in cases involving large rental complexes or steering by brokers. Metro conducts an audit by performing a number of similar tests. In each test during an audit, applicants of different races but similar credentials are sent at approximately the same time to the broker or rental agent suspected of discriminating against a complainant.

Testers for Metro receive ten dollars for each test performed, but do not share directly in any judgments obtained by Metro. As part of their training, testers are instructed to look in offices for the fair housing poster that must be displayed, pursuant to 24 C.F.R. part 110, by all persons who provide federally subsidized housing. When sent out to perform a test, a tester is not told to look for any specific things other than the fair housing poster.

Two testers visited Windrush Apartments on February 17, 1983. Peggy Fiskum, the white tester, arrived at the complex around noon and was greeted pleasantly. She inquired about two bedroom units, but did not ask about Section 8 housing. Nevertheless, Loretta Smith volunteered information about the lower-rental Section 8 two bedroom units, told Fiskum that several such units were still available, and further told her, "We want nice people in them." Although Fiskum had expressed no interest in a Section 8 unit, Smith and McGill asked her immediately for income information and performed calculations at that time to determine whether she and her husband would qualify for a Section 8 two bedroom apartment.

The rental agents also encouraged Fiskum to return later that day with her husband because few units were left. Fiskum was not told how long qualification for an apartment would take, but she was told to hurry if she wanted an apartment. Fiskum was in the rental office for at least twenty minutes, and while there looked for but did not see the required fair housing poster. Fiskum testified that she heard no racially discriminatory remarks from either rental agent.

That same day, Della Burroughs, the black tester, inquired at Windrush as to the availability of rental units and was shown a model apartment by Smith. While they were in the model unit, Burroughs asked what the rental hours were so she could return with her husband. Smith did not answer then, but once they had returned to the rental office, Smith told her the office hours and handed her an application. At some time during Burroughs's visit, Smith asked her where she and her husband worked. At no time, however, did Smith bring up the subject of the availability of Section 8 apartments, ask what type of work Mr. and Mrs. Burroughs performed for their employers, inquire as to their incomes, or encourage Burroughs to hurry back.

Like Fiskum, Burroughs looked for but could not find the fair housing poster.

During the first and second weeks of March, six testers from Metro visited the rental office at Windrush Apartments. Sarah Buckingham, a white tester, was told that Windrush had two-bedroom units available. Section 8 housing was not mentioned during her visit, and no one asked her about her income or employment. She looked for but did not see the fair housing poster. Priscilla Casamayor, a black tester, also looked for the fair housing poster but saw none. Neither her income nor her employment was discussed.

Jerry Abernathy, a white tester, asked specifically about Section 8 housing, was told that none of the Section 8 units would be expected to become available soon, but was offered an application. He saw no fair housing poster. Wilbert McCree, a black tester who is also employed by Metro as a counselor, was likewise told that no Section 8 units were likely to be available in the near future. When he asked whether he could put an application on file, he was told that doing so would probably be useless. Like the others, he saw no fair housing poster.

During that time, Peggy Fiskum returned to the apartment complex and was told that the Section 8 units had been filled. Nevertheless, she was told that she could fill out an application. She once again attempted to locate the fair housing poster but did not see one.

Marcia Borowski, the executive director of Metro, also visited Windrush Apartments as a white tester. In part, she went to determine whether any conventional rental units remained available at Windrush Apartments that, in the event of a lawsuit, could be set aside for Gresham. She testified that she was shown both two and three bedroom units and was strongly encouraged to apply for an apartment.

Neither Borowski nor the rental agent with whom she spoke, Edna Pritchard, mentioned Section 8 housing.

Based on the results of its testing Metro decided to support Gresham in bringing this lawsuit. In her complaint and request for a preliminary injunction Gresham alleges that the defendants refused to rent a Section 8 apartment to her because she is black, in violation of 42 U.S.C. §§ 1981 and 1982, the Federal Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, and the thirteenth amendment. On its own behalf, Metro claims that defendants have engaged in racially discriminatory housing practices that have frustrated and taxed Metro's counseling and referral services, causing an attendant drain on resources. Moreover, Metro asserts that the defendants' practices have deprived Metro's members of the benefits of living in an integrated community free of housing discrimination.

Following a preliminary injunction hearing on March 24-25, 1983, the district court granted in part and denied in part plaintiffs' motion for preliminary relief. The district court found that plaintiffs showed a substantial likelihood of success on their claim that defendants had acted in a racially discriminatory manner in their operation of Windrush Apartments, but that plaintiffs failed to establish that race discrimination was a significant factor in the denial of a Section 8 apartment to Gresham. In particular, the district court found that defendants had failed to display the fair housing poster in the manner required, and that defendants had given prospective white tenants encouragement that had not been given to blacks who came by the Windrush rental office. Additionally, the district court found that defendants had failed to comply with federal regulations requiring that they have a marketing plan whereby they attempt to make the availability of Section 8 housing known within the black community. *See* 24 C.F.R. §§ 200.620(a), 200.625. Moreover, defendants failed to ensure that the employees of Windrush were instructed, orally

and in writing, in the federal policy of nondiscrimination and fair housing. *See* 24 C.F.R. § 200.620(c).

The district court entered the following injunction:

> It is therefore ORDERED that defendants Windrush Partners, Ltd., and Leo Management Company, their officers, employees, agents, and successors, and all persons acting in concert or participation with any of them, and in particular defendants Thomas L. Williams and Tina McGill, are ENJOINED from
>
> (1) Discriminating against any person in the terms, conditions, or privileges of the rental of any apartment at Windrush Apartments because of race;
>
> (2) Actively encouraging or soliciting any white person as a tenant at Windrush Apartments unless equal encouragement or solicitude is afforded to all black persons who inquire as to the availability of housing at Windrush Apartments; and
>
> (3) Failing to display the required fair housing poster in a prominent location in each and every room at Windrush Apartments in which the defendants, their agents, and employees provide information about, answer inquiries in regard to, or receive applications for housing at Windrush Apartments.

Defendants promptly appealed from this injunction.

II. ISSUES

[1, 2] Windrush raises two main issues in this appeal.[2] The first is whether the district court erred in finding the

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[2] Windrush raises several other issues that we believe need no extended discussion. One is whether the trial court abused its discretion in granting the preliminary injunction. Although a preliminary injunction is "extraordinary" relief, the grant or denial of such relief rests within the sound discretion of the district court. *See Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d

requisite "irreparable injury" necessary for the issuance of a preliminary injunction. The second is whether the injunctive relief ordered in this case is overbroad in some respects, and so lacking in specificity as to be unenforceable in other respects. Although we affirm the district court on the propriety of issuing a preliminary injunction, we have modified the injunction to provide greater specificity.

III. DISCUSSION

A. *The Finding of Irreparable Injury*

Because a preliminary injunction is an extraordinary remedy, a motion for such relief will be granted only if the movant satisfies a showing of four prerequisites: (1) a substantial likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable injury unless the injunction issues; (3) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983). The district court found that plaintiffs had met each of these prerequisites with respect to part of the relief they requested. Appellants contend that the district court erred in finding that plaintiffs had satisfied the irreparable injury

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1352 (11th Cir. 1983). For the reasons stated in our discussion of the first issue, in the text below, we find no abuse of that discretion here. The other issue is whether the trial court's finding that Windrush engaged in the racially discriminatory housing practice of encouraging whites who inquire about subsidized housing but not encouraging blacks in similar situations is clearly erroneous. We find that the evidence in the record supports the district court's conclusion, and we are not left with "a definite and firm conviction that a mistake has been committed," *Marable v. H. Walker and Associates*, 644 F.2d 390, 391, 395 (5th Cir. 1981). Therefore, the district court's finding is not clearly erroneous.

requirement of the showing necessary to obtain a preliminary injunction.

In finding irreparable injury, the district court stated, "[T]he strong national policy against race discrimination in housing leads the court to conclude that once a plaintiff has demonstrated the likelihood of success on the merits of a claim of housing discrimination, irreparable injury must be presumed. *See Banks v. Pe[r]k*, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part*, 473 F.2d 910 (6th Cir. 1973) (mem.)." Appellants contend that such a presumption is incorrect, and that plaintiffs seeking a preliminary injunction against housing discrimination must separately show irreparable injury after they show a substantial likelihood that discrimination occurred.

[3] We agree with the district court that irreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes. In *United States v. Hayes International Corporation*, 415 F.2d 1038, 1045 (5th Cir. 1969), the old Fifth Circuit[3] held that, "Where . . . an injunction is authorized by statute and the satutory conditions are satisfied . . . the usual prerequisite of irreparable injury need not be established and the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury before obtaining an injunction." [citations and footnote omitted]. The *Hayes International* court went on to state that "irreparable injury should be presumed from the very fact that the statute has been violated." *Id.; accord Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981); *Heublein, Inc. v. Federal Trade Commission*, 539 F.Supp. 123, 128 (D. Conn. 1982); *U.V. Industries, Inc. v. Posner*, 466 F.Supp.

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

1251, 1255-56 (D. Maine 1979); 7 Moore's Federal Practice, § 65.04(1) n. 7b. In the case at hand the district court found certain specific violations of the regulations implementing the Fair Housing Act. The Act and its regulations prohibit certain discriminatory practices without regard to their actual effect on the community. We hold that when a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction remedying those violations. *See, e.g., TOPIC v. Circle Realty*, 377 F.Supp. 111, 114 (C.D. Cal. 1974), *rev'd on other grounds*, 532 F.2d 1273 (9th Cir. 1975), *cert. denied*, 429 U.S. 859, 97 S.Ct. 160, 50 L.Ed.2d 137 (1976).

Moreover, we believe that when housing discrimination is shown it is reasonable to presume that irreparable injury flows from the discrimination. Appellants mistakenly argue that such a presumption does away with the requirement of irreparable injury. Nothing could be further from the truth. A presumption, as used in a case such as this, is merely an evidentiary technique used to apportion the burdens at trial and to maximize the efficiency of the judicial process. Such a presumption, may, of course, be rebutted by evidence that any injury that may occur is not irreparable. Thus, the real question in this case is whether the presumption of irreparable injury logically follows from a showing of a substantial likelihood that illegal discrimination has occurred.

Discrimination in housing, when proved, almost always results in irreparable injury. *See Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F.Supp. 198 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."); *cf. Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (showing probability of success on merits that first amendment rights violated sufficient to show irreparable injury because loss of first amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury) (Brennan, J., joined by White and Marshall, JJ., in plurality opinion); *Ostrowski v. Local 1-2, Utility Workers Union of America, AFL-CIO*, 530 F.Supp. 208 (S.D.N.Y. 1980) (loss of first amendment freedoms for even minimal periods of time constitutes irreparable injury). Several reasons explain why housing discrimination results in irreparable injury. First, a person who is discriminated against in the search for housing cannot remain in limbo while a court resolves the matter. He or she must find housing elsewhere, and once that housing is found, even if in a segregated neighborhood, it becomes difficult to disrupt new friendships and other community ties by uprooting oneself again.

[4] Second, in a case such as this one, the available housing where the discrimination is occurring could become filled during the pendency of a lawsuit, making corrective relief nearly impossible to enter—clearly, a court lacks the authority to order innocent white tenants to vacate apartments to remedy discrimination against blacks or other minorities by the apartment management. Thus, preliminary injunctive relief may be necessary to insure that a remedy will be available. Third, monetary relief cannot correct the injury completely. In *Banks v. Perk* the court recited a litany of irreparable harm that occurs whenever housing discrimination occurs. That harm included, "the loss of safe, sanitary, decent and integrated housing; the loss of achieving integrated schools without the necessity of massive busing; the loss of housing which is accessible to jobs; and the loss of being unable to escape the never-ending and seemingly unbreakable cycle of poverty." 341 F.Supp. at 1185. *See also Zuch v. Hussey*, 394 F.Supp. 1028, 1052 (E.D. Mich. 1975) ("steering" and "blockbusting" practices of real estate agents in Detroit area cause irreparable harm). Additionally, as plaintiffs have asserted in this case housing discrimination causes irreparable injury by denying whites, as

well as blacks, the benefits of living in an integrated community.

[5] In sum, we hold that because of the subtle, pervasive, and essentially irremediable nature of racial discrimination, proof of the existence of discriminatory housing pratices is sufficient to permit a court to presume irreparable injury. There being no evidence in the record tending to rebut this presumption we affirm the district court's conclusion that preliminary relief was appropriate in this case.

B. *The Scope of The Injunction*

Appellants contend that the injunction entered by the district court is too vague for them to be able to comply with its terms without fear that they will inadvertently violate one or more provisions. They also assert that portions of the injunction are overbroad. Although we believe the relatively simple terms of the district court's injunction are quite clear in the context of this litigation, we make some modifications to calm the fears of appellants. Accordingly, the district court's preliminary injunction is amended to read as follows:

It is therefore ORDERED that defendants Windrush Partners, Ltd., and Leo Management Company, their officers, employees, agents, and successors, and all persons acting in concert or participation with any of them, and in particular Thomas L. Williams and Tina McGill, are ENJOINED from

(1) Discriminating against any person in the terms, conditions, or privileges of the rental of any apartment at Windrush Apartments because of race by actively encouraging or soliciting any white person as a tenant at Windrush Apartments unless equal encouragement or solicitude is afforded to black persons who inquire as to the availability of housing at Windrush Apartments.

(2) Failing to display the required fair housing poster in a prominent location in each room of the rental office at Windrush Apartments in which the defendants, their agents, and employees provide information about, answer inquiries in regard to, or receive applications for housing at Windrush Apartments.

(3) Failing to instruct all employees and agents of Windrush Apartments in writing and orally of the policy of nondiscrimination and fair housing.

The district court's judgment as amended is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DERREAN GRESHAM and METRO FAIR HOUSING SERVICES,
Plaintiffs,

vs.

WINDRUSH PARTNERS, LTD., d/b/a WINDRUSH APARTMENTS; LEO MANAGEMENT COMPANY; THOMAS L. WILLIAMS; and TINA McGILL,
Defendants.

CIVIL ACTION
C83-562

ORDER

This housing discrimination action is before the court on the plaintiffs' motion for a preliminary injunction. Rule 65, Fed. R. Civ. P.

Plaintiff Derrean Gresham is a black female who currently resides in DeKalb County, Georgia. Plaintiff Metro Fair Housing Services (MFHS), is a nonprofit corporation organized under the laws of Georgia and is devoted to the promotion of integrated housing in the Atlanta metropolitan area. Its activities include the operation of a housing counseling service and referral service, and the investigation of complaints concerning housing discrimination.

Defendant Windrush Partners, Ltd. (Windrush), owns and operates Windrush Apartments (Windrush), a large, federally subsidized residential complex located at 3841 Kensington Road in Decatur, Georgia. Defendant Thomas Williams is the president of defendant Leo Management Company (Leo), which manages the Windrush Apartments complex. Defendant Tena McGill has been resident manager of the Windrush Apartments since January 15, 1983.

Ms. Gresham has sought, and has been placed on a waiting list for, one of the units at Windrush Apartments that have been made available for low income families at a reduced rental rate as the result of a federal rent subsidy provided by Section 8 of the National Housing Act of 1937 as amended, 42 U.S.C. § 1437f. In this action she alleges that the defendants have refused to rent the apartment to her because she is black, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982; the Civil Rights Act of 1870, 42 U.S.C. § 1981; the Federal Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601 *et seq*; and the thirteenth amendment to the Constitution of the United States. MFHS asserts that the defendants have engaged in racially discriminatory housing practices that have frustrated and taxed its counseling and referral services, with a consequent drain on resources. MFHS also alleges that defendants' practices have deprived its members of the benefits of living in an integrated community free of housing discrimination.

Plaintiffs urge the court to enjoin the defendants from (1) renting two-bedroom apartments currently available at Windrush Apartments, pending the resolution of this matter; (2) from refusing to rent to Ms. Gresham from among the available two-bedroom units at Windrush Apartments, an apartment of her choice at the same monthly rental as and on such other terms as are applicable to comparable Section 8 units at Windrush Apartments; and (3) from engaging in conduct that has the purpose or effect of interfering with or denying equal housing opportunities and fair housing rights to any person on the basis of race.

The court received evidence with respect to the present motion in a hearing on March 25, 1983.

I. Evidence Adduced at Hearing

A. **Windrush Apartments**

Windrush Apartments presently comprises 202 units, consisting of one-, two-, and three-bedroom apartments.

Forty-one of these units are Section 8 apartments. The first "conventional," that is, non-Section 8, apartments were available for occupancy in October or November 1982. The first Section 8 units were available for rental on February 1, 1983.

As of March 24, 1983, 114 apartments, including both conventional and Section 8 units, had been rented. Of this tital, 86 (75%) were rented to whites, 19 (17%) to blacks, and 9 (8%) to orientals. Neither party has informed the court of the member and racial make-up of the Section 8 units that had been rented as of the same time. The population of the complex's immediate neighborhood is estimated to be 90% white and 10% black.

B. **Plaintiff Gresham**

On Monday morning, January 31, 1983, Ms. Gresham telephoned the Windrush Apartments rental office and asked defendant McGill whether applications were being accepted for two-bedroom, Section 8 apartments. Ms. McGill told Ms. Gresham that she was busy and could not talk, and to call back. Several hours later, Ms. Gresham called back, and Ms. McGill told her that she was busy with other applicants and could not talk. Ms. Gresham then informed Ms. McGill that she would be there soon to fill out an application.

At approximately noon on that day, Ms. Gresham went to the leasing office of Windrush Apartments, which was then located in a model apartment. She was accompanied by three other persons, all of whom are black. Ms. McGill offered all of them, including Ms. Gresham, applications for apartments in Windrush Apartments. Ms. Gresham and Carolyn Smith, one of the individuals with Ms. Gresham, asked whether one- and two-bedroom units under the Section 8 program were available. Ms. McGill told them they were. Ms. McGill did not offer to show them around the complex.

Ms. Smith sought to apply for a one-bedroom Section 8 apartment but was informed, after partially completing her application form, that there were no one-bedroom units available because the remaining one-bedroom units were reserved for handicapped individuals. Ms. Gresham sought to apply for a two-bedroom unit, after asking Ms. McGill whether that was the appropriate size for a mother and two children. Ms. McGill told here that her employment and income had to be verified by her employer prior to qualification for the Section 8 apartments. Ms. Gresham was also told that a credit check was required for qualification for Section 8 housing. Ms. Gresham was told that she would have to provide her children's birth certificates, but was not told when to submit them. Ms. McGill did not offer to calculate the amount that Ms. Gresham's Section 8 rent would be at Windrush Apartments. Ms. McGill suggested that Ms. Gresham call if she did not receive notification regarding the status of her application within the following two weeks. On the next day, February 1, 1983, Ms. McGill mailed an employment verification form to Ms. Gresham's employer, the Stadium Hotel in Atlanta.

During the following two weeks, Ms. Gresham telephoned Ms. McGill several times to ask about the status of the processing of her application. Ms. McGill always replied that the processing was not completed and that she was waiting for information to be returned through the mail.

On February 17, 1983, Ms. Gresham once again called the Windrush Apartments rental office and on that occasion asked what else she could do to speed up her qualification for Section 8 housing. Ms. McGill told her that copies of the birth certificates of her children were needed for her file and that she could bring them into the office. Ms. Gresham testified that Ms. McGill also informed her that Ms. McGill had lost the application and that Ms. Gresham needed to fill out another one. Ms. McGill stated in an affidavit that she told Ms. Gresham only that her employment verifica-

tion form had been misplaced, not that her application had been lost. Ms. Gresham attributed the apparent loss of the form to the recent move, on February 16 and 17, of the rental office from the model apartment to its present location in the apartment clubhouse.

Ms. Gresham, under the impression that defendants had lost her rental application, went to the rental office that same day to complete another application. When Ms. Gresham arrived at the rental office, Ms. McGill informed her that she had found the application, but that now she needed the following: birth certificates for Ms. Gresham and her two children, the telephone number of Ms. Gresham's previous resident manager, and one more employment verification form from her employer. Ms. McGill deviated from Windrush's ordinary procedure by allowing Ms. Gresham to hand-carry the employment verification form to her employer, but advised her that the form had to be mailed in by her employer. Ms. Gresham collected the newly-requested documents and information and returned to the rental office later that afternoon to deliver them to Ms. McGill.

Ms. Gresham testified that when she returned with the birth certificates, Ms. McGill told her that the office's photocopying machine had broken down and that she could bring them back later. In order to facilitate Ms. McGill's long-delayed completion of the processing of her application, Ms. Gresham told her to keep the birth certificates and that she would pick them up later. Ms. Gresham also testified that Ms. McGill offered no apology for the apparent loss of the employment verification form.

Ms. McGill testified that she informed Ms. Gresham that the photocopying maching located in the Windrush Apartments Rental Office was inoperable on that day because a proper electric outlet for the maching had not yet been installed in the new rental office, and that as a result, she was unable to make copies of Ms. Gresham's children's

birth certificates. Ms. McGill also testified that she apologized for the apparent loss of the employment verification form. At some time that same day, the first employment verification form from Ms. Gresham's employer arrived in the mail in an envelope postmarked February 15, 1983.

At about the same time in February, Ms. McGill became aware that there were ten applicants who had completed the required processing and were qualified for Section 8 two-bedroom units and that there were only five available Section 8 two-bedroom units. Ms. McGill, who had no previous Section 8 housing experience, requested that her supervisor, Loretta Smith, who had experience with rental of Section 8 housing, make selections of those five persons or families who were to be accepted for immediate tenancy in the available two-bedroom Section 8 units.

Explaining the selection procedure, Ms. Smith testified that after Windrush had received more applications than it had apartments in each category of Section 8 units—one-, two-, and three-bedroom apartments—she reviewed all of the applications and other documents in each applicant's file, none of which indicated the applicant's race. She then selected for immediate occupancy the tenants who appeared to have the most favorable rental histories and credit references. She testified that none of her decisions were based on the race, age, or sex of the applicants. After the initial tenants were selected, she created waiting lists for each category and sent "waiting list letters" to persons whose applications showed probable financial qualification for Section 8 assistance and whose verification forms had been received. Waiting list letters were also sent to persons for whom employment verification forms or credit references had not been received, if these applicants appeared to her likely to qualify in view of the information available.

Applicants were placed on the waiting list in chronological order based on the initial date of submission of each application. Loretta Smith testified, however, that when a

Section 8 unit becomes available in the future, she may select not the next applicant on the list, but the applicant whose rental history and credit references make the latter a "more acceptable" tenant.

On February 23, 1983, pursuant to Ms. McGill's request and applying the procedure outlined above, Loretta Smith selected the five applicants whom she deemed most qualified for the available two-bedroom, Section 8 apartments and instructed Ms. McGill to notify them of their selection as Section 8 tenants. Ms. Smith testified at trial that of the five applicants selected, one is black and four are oriental. She could not testify as to the racial makeup of the persons who were not selected. Ms. Gresham, who was not among those selected, was placed on the waiting list for two-bedroom apartments that same day. Ms. McGill informed Ms. Gresham by telephone on February 23, 1983, that her application had been placed on the waiting list. A waiting-list letter was mailed to Ms. Gresham on March 11, 1983.

C. **MFHS Testers**

Ms. Gresham contacted MFHS regarding her experience at Windrush Apartments. Thereafter, in February and March 1983, MFHS sent various white and black testers to "test" or "audit" Windrush Aparments for racially discriminatory housing practices. Testing and auditing are common methods used by MFHS to investigate claims of fair housing violations. To conduct a test for possible race discrimination, MFHS selects a tester whose race is different from that of the person who has complained of discrimination. MFHS instructs the tester to give particular information similar to or the same as the credentials of the complainant. The tester then applies for the same housing and reports the results to MFHS, who compares the report with the complainant's story to determine whether the latter was denied housing on racial grounds. Auditing is a form of testing commonly employed in cases involving large rental com-

plexes or steering by brokers. MFHS conducts an audit by performing a number of similar tests. In each test during an audit, applicants of differing race but equal credentials are sent at approximately the same time to the broker or rental agent suspected of discriminating against a complainant.

Testers for MFHS receive $10.00 for each test performed, but do not share directly in any judgments obtained by MFHS. As part of their training, testers are instructed to look in offices for the fair housing poster that must be displayed, pursuant to 24 C.F.R. part 110, by all persons who provide federally subsidized housing. When sent out to perform a test, a tester is not told to look for any specific things other than the fair housing poster.

Two testers visited Windrush Apartments on February 17, 1983. Peggy Fiskum, the white tester, arrived at the complex around noon and was greeted pleasantly. She inquired about two-bedroom units, but did not ask about Section 8 housing. Nevertheless, Loretta Smith volunteered information to her about the lower-rental Section 8 two-bedroom units, told her that there were several such units still available, and further told her, "We want nice people in them." Even though Ms. Fiskum had expressed no interest in seeking a Section 8 unit, Loretta Smith and Ms. McGill immediately asked her for income information and quickly performed calculations at that time to determine whether she and her husband would qualify for a Section 8 two-bedroom apartment.

The rental agents also encouraged Ms. Fiskum to return later that day with her husband because there were few units left. She was not told how long qualification for an apartment would take, but she was told to hurry if she wanted an apartment. While Ms. Fiskum was in the rental office, for at least twenty minutes, she looked for but did not see the required fair housing poster. Ms. Fiskum testified that she heard no racially discriminatory remarks from either rental agent.

That same day, Della Burroughs, the black tester, inquired at Windrush as to the availability of rental units and was shown a model apartment by Loretta Smith. While they were in the model unit, Ms. Burroughs asked what the rental hours were so she could return with her husband. Loretta Smith did not answer then, but once they had returned to the rental office, Ms. Smith told her the hours the office was open and handed her an application. At some time during Ms. Burroughs' visit, Loretta Smith asked her where she and her husband worked. At no time, however, did Ms. Smith bring up the subject of the availability of Section 8 apartments, ask what type of work Mr. and Mrs. Burroughs performed for their employers, inquire as to their incomes, or encourage Ms. Burroughs to hurry back. Like Ms. Fiskum, Ms. Burroughs looked for but could not find the fair housing poster.

During the first and second weeks of March, six testers from MFHS visited the rental office at Windrush Apartments. Sarah Buckingham, a white tester, was told that Windrush had two-bedroom units available. Section 8 housing was not mentioned during her visit, and no one asked her about her income or employment. She looked for but did not see the fair housing poster. Priscilla Casamayor, a black tester, also looked for the fair housing poster but saw none. Neither her income nor her employment was discussed.

Jerry Abernathy, a white tester, asked specifically about Section 8 housing, was told that none of the Section 8 units would be expected to become available soon, but was offered an application. He saw no fair housing poster. Wilbert McCree, a black tester who is also employed by MFHS as a counselor, was likewise told that no Section 8 units were likely to be available in the near future. When he asked whether he could put an application on file, he was told that doing so would probably be useless. Like the others, he saw no fair housing poster.

During that time, Peggy Fiskum returned to the apartment complex and was told that the Section 8 units had been filled. However, she was also told that she could fill out an application. She once again attempted to locate the fair housing poster but did not see one.

Marcia Borowski, the executive director of MFHS, also visited Windrush Apartments as a white tester. In part, she went to determine whether any conventional rental units remained available at Windrush Apartments that, in the event of a lawsuit, could be set aside for Ms. Gresham. She testified that she was shown both two- and three-bedroom units and was strongly encouraged to seek an apartment. Neither Ms. Borowski nor the rental agent with whom she spoke, Edna Pritchard, mentioned Section 8 housing.

D. **Affirmative Fair Housing Marketing Plan**

As a participant in a federal housing subsidy program, Windrush is required by 24 C.F.R. § 200.620 to, among other things,

> (a) Carry out an affirmative program to attract buyers or tenants, regardless of sex, of all minority and majority groups to the housing for initial sale or rental. An affirmative marketing program shall be in effect for each multifamily project throughout the life of the mortgage. Such a program shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex or national origin, through the type of media customarily utilized by the applicant, including minority publication or other minority outlets which are available in the housing market area. All advertising shall include either the Department-approved Equal Housing Opportunity logo or slogan or statement and all advertising depicting persons shall depict persons of majority and minority groups, including both sexes.

(b) Maintain a nondiscriminatory hiring policy in recruiting from both minority and majority groups, including both sexes, for staff engaged in the sale or rental of properties.

(c) Instruct all employees and agents in writing and orally in the policy of nondiscrimination and fair housing.

. . . .

(e) Prominently display in all offices in which sale or rental activity pertaining to the project or subdivision takes place the Department approved Fair Housing Poster and include in any printed material used in connection with sales or rentals, the Department-approved Equal Housing Opportunity logo or slogan or statement.

Identical duties are imposed on Windrush by Department of Housing and Urban Development (HUD) Handbook 4350.3 for Owners, Managing Agents, and Resident Managers of Subsidized Multifamily Housing Developments. Under 24 C.F.R. § 200.625, at the time of application to participate in the housing subsidy program, Windrush was required to submit to HUD an affirmative fair housing marketing plan (marketing plan) designed to inform HUD of Windrush's plans to comply with the requirements of section 200.625. Windrush submitted the required marketing plan, which was subsequently approved by HUD. In it, Windrush projected "Anticipated Occupancy Results" of 161 (80.7%) units rented to whites and 41 (20.3%) units to blacks.[1] At trial, Stanley Barnwell, the person at Windrush

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[1] At the preliminary injunction hearing and in their brief, the plaintiffs have argued that the marketing plan called for 39% black occupancy at Windrush. Plaintiffs have not explained how they arrived at that figure, which is, given the plaintiffs' reliance on the same numbers, incorrect.

responsible for the marketing plan, expressed little familiarity with the plan and could not testify as to its specific contents, though he did recall that Windrush had projected a white-to-black ratio of approximately 80% to 20%.

Loretta Smith testified that she understood that the purpose of the marketing plan is to attempt to assure that persons who would be least likely to apply will become aware of and apply for housing at Windrush. She did not believe that the marketing plan applied only to Section 8 housing. Attempting to carry out the plan, Ms. Smith accordingly sent letters to churches in the immediate neighborhood and to agencies involved with working with handicapped persons. Advertisements were also placed in several local newspapers. No one at Windrush attempted to contact organizations identified with racial minorities.

There are no black employees on the rental management staff of Windrush Apartments. Ms. McGill admitted that she has received no special instruction regarding fair housing and the laws against housing discrimination. She was unable at the hearing to testify as to the precise language contained in the fair housing poster. Loretta Smith testified that a fair housing poster was located in a prominent place at the time the rental office was located in the model apartment and that after the rental office was moved to the clubhouse, the poster was placed over the resident manager's desk in an inner office in which interviews with applicants are conducted. Persons who merely entered an outer office to inquire about the availability of apartments, she stated, could see the poster through a window located between the outer and inner offices.

II. Motion for Preliminary Injunction

A preliminary injunction is an extraordinary remedy, and a motion for such relief will be granted only if the movant clearly satisfies the following four prerequisites: (1) a substantial likelihood that the movant will ultimately pre-

vail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983).

For the reasons that follow, the court concludes that the plaintiffs have satisfied these prerequisites only as to a portion of the preliminary relief they seek, and, accordingly, the court will grant in part and deny in part the plaintiffs' motion.

A. Likelihood of Success on the Merits

The provisions of 42 U.S.C. § 3604 and 42 U.S.C. § 1982[2] make independent statutory remedies available to persons who have been denied housing because of their race. *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 561 (5th Cir. 1979). Section 3604 makes it unlawful, among other things,

> (a) [T]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin, [and]
>
> (b) [T]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in

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[2] In seeking the preliminary injunction, the plaintiffs have not relied upon their claims based upon 42 U.S.C. § 1981 and the thirteenth amendment. As a result, the court has not considered the likelihood of their success on these claims.

connection therewith, because of race, color, religion, sex, or national origin.

Section 1982 provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." To prevail under these sections on a claim that housing has been denied because of race, a plaintiff need prove only that race was one significant factor, not that racial animus was the sole reason for the denial of housing. *Woods-Drake v. Lundy*, 667 F.2d 1198, 1202 (5th Cir. 1982); *Marable v. H. Walter & Associates*, 644 F.2d 390, 395 (5th Cir. 1981).

Having viewed the evidence adduced at the preliminary injunction hearing, the court concludes that the plaintiffs have shown a substantial likelihood of success on their claim that in managing the Windrush Apartments the defendants have acted in a racially discriminatory manner. However, they have not established that race discrimination was a significant factor in their decision not to rent a Section 8 apartment to Ms. Gresham.

Ms. Fiskum, the white tester who inquired at Windrush's rental office on February 17, 1983, was actively solicited as a tenant for Section 8 housing. The rental agenst volunteered information about subsidized housing, performed calculations to determine how much rent she would have to pay for such housing, urged her to return with her husband quickly, and, having seen no credit report or rental history, told her, in effect, that she was the kind of "nice" tenant they were seeking.

Her experience contrasts sharply with the treatment afforded Ms. Gresham and Ms. Burroughs, the black tester who also inquired at the rental office on February 17, 1983. While Ms. Burroughs was not treated with any discourtesy that would have been likely to discourage her from completing an application, neither was she accorded the same

active encouragement that was extended to Ms. Fiskum. In effect, while Ms. Burroughs was merely permitted to seek housing, Ms. Fiskum was invited. The experiences of the other white testers, who were also encouraged to seek housing, similarly contrasts with the experiences of the other black testers.

Defendants treated Ms. Gresham in substantially the same manner as Ms. Burroughs, though Ms. Gresham's experience was somewhat more complicated. The court finds credible the defendants' explanation concerning the apparent loss first of Ms. Gresham's application and then of her income verification form on February 17, 1983, at the time of the moving of the rental office. It is clear as well that the responsibiltiy for much of the delay in processing her application rests with her employer, who failed to mail in the form until February 15, 1983. The court also notes that Ms. Gresham received favorable treatment when Ms. McGill allowed her to hand-carry the second employment verification form. Nevertheless, Ms. Gresham was not initially told when she should provide copies of her children's birth certificates, nor was she told to hurry to provide that information. And again, in contrast to Ms. Fiskum's experience at Windrush, Ms. Gresham was not actively encouraged to apply.

Moreover, the defendants' attempts at compliance with several HUD regulations have been at best half-hearted. At Windrush Apartments, no fair housing poster is "prominently displayed so as to be readily apparent to all persons seeking housing accommodations." 24 C.F.R. § 110.15. While someone may have seen the poster had he been invited into the resident manager's office to fill out an application, the defendants have not shown that anyone was ever interviewed in that inner office. To the contrary, none of the witnesses who inquired about housing at Windrush Apartments was invited into that office. Nor did any tester, trained to look for the poster, see the poster by looking

through the window into the inner office. Further, the defendants clearly did not attempt to make the availability of Section 8 housing known to blacks in the community as they were required to do by the marketing plan requirements of 24 C.F.R. §§ 200.620(a), 200.625.[3] Finally, although Loretta Smith had previously dealt with applications for Section 8 housing, neither Ms. Smith nor Ms. McGill received written and oral instruction in the federal policy of nondiscrimination and fair housing, as required by 24 C.F.R. § 200.620(c).

Under 24 C.F.R. § 110.30, the defendants' failure to display the fair housing poster must be deemed prima facie evidence that the defendants have engaged in some form of housing discrimination. Although HUD regulations create no similar presumption regarding the defendants' failure to implement properly the marketing plan or to provide the required written and oral instruction as to nondiscrimination, their shortcomings as to these requirements are probative evidence of the defendants' attitude toward their obligation under the FHA.

Given the above facts, the court finds it very likely that the plaintiffs can show at trial that the defendants have engaged in the racially discriminatory housing practice of giv-

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[3] There exists some tension between the nondiscrimination provisions of the FHA and HUD's regulations requiring providers of subsidized housing to file a marketing plan. To the extent that attempts to follow the marketing plan succeed in increasing the number of minority applicants for available subsidized housing, the plan increases the likelihood that minority applicants will receive the benefits of such housing. Because this increase in the chance of obtaining housing results from attempts to attract applicants of particular races, it could be said that unsuccessful applicants were denied housing "because of" race, in violation of the FHA. This tension need not be resolved in this case, however, because the defendants have conceded the validity of the marketing plan requirement.

ing to whites who inquire about subsidized housing encouragement that is not afforded blacks. However, although such disparate treatment could conceivably result in more Section 8 housing having been made available to whites than to blacks, the plaintiffs have not demonstrated a likelihood that they can show at trial that this practice resulted in the denial of housing to Ms. Gresham.

Despite the disparate treatment, Ms. Gresham's application was considered for the available Section 8 units. The evidence indicates that Loretta Smith based her decisions on permissible criteria—rental histories and employment verification forms—in an attempt to select tenants who were likely to be responsible residents.[4] *See* Affidavit of Loretta Smith, dated March 23, 1983, Exh. A, HUD Handbook 4350.3 at § 4, ¶ 3-8. Because the standards applied by Ms. Smith are racially neutral, the defendants' discriminatory practice could have been a significant factor in the denial of an apartment to Ms. Gresham only if it had the effect of producing a pool of applicants that contained fewer blacks than the pool would have contained had the defendants actively encouraged blacks as well as whites to apply—that is, only if the defendants had decreased the chance that they would rent to blacks or increased the chance that they would rent to nonblacks.

Although it is possible that the applicant pool was skewed to disfavor blacks, the plaintiffs have not demonstrated an ability to present evidence showing that the applicant pool was in fact so distorted. The evidence adduced

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[4] Several courts have held that so long as providers of Section 8 housing do not employ selection standards that have a racially discriminatory effect, they may apply reasonable criteria other than financial eligibility, and particularly criteria designed to identify responsible tenants. *See* Daubner v. Harris, 514 F.Supp. 856 (S.D. N.Y. 1981); Ressler v. Landview, 502 F.Supp. 324 (D. Alaska 1980).

at the hearing shows only that of the five applicants selected for Section 8 housing, one was black and four were oriental. Nothing in the record suggests that the defendants have treated orientals with the same solicitude that was shown for whites. Nor have the plaintiffs shown that anyone in the applicant pool was white. Absent such a showing, the court cannot presume that the defendants' discriminatory practice was a significant factor, or any factor at all, in the defendants' failure to rent a Section 8 apartment to either Ms. Gresham or any other applicant who was denied such an apartment. The court therefore will not order that the defendants cease rental of all two-bedroom apartments at Windrush or that they allow Ms. Gresham to rent a conventional apartment on Section 8 terms.

Nonetheless, the plaintiffs have demonstrated the substantial likelihood that the defendants have engaged in a discriminatory practice with regard to Section 8 housing. Moreover, the court finds that the plaintiffs may likely show that the defendants solicitude for white tenants is not limited to Section 8 housing. The evidence of the testers shows that as of the date of the preliminary injunction hearing, the defendants continued to encourage whites but not blacks and had not improved upon their attempts to comply with HUD's fair housing regulations. These discriminatory practices constitute, if not a denial of housing, at least discrimination in the "terms, conditions, or privileges of . . . rental of a dwelling," 42 U.S.C. § 3604(b), as well as an attempt to make such housing less readily available to blacks. 42 U.S.C. § 3604(a); *cf. United States v. Youritan Construction Co.*, 370 F.Supp. 643, 648 (N.D. Col. 1973), *aff'd in part and reversed in part on other grounds*, 509 F.2d 623 (9th Cir. 1973) (imposition on blacks of more burdensome application procedures, delaying tactics, and various forms of discouragement by resident manager and rental agent constitutes violation of FHA). The court therefore concludes that the plaintiffs have shown substantial likelihood of success on the merits of their claim that the

defendants have engaged in conduct that has the purpose or effect of interfering with or denying equal housing opportunities on the basis of race.

B. Irreparable Injury, Balance of Harms, and Public Interest

Plaintiffs have also satisfied the remaining elements of the test for preliminary injunctive relief on this claim. First, the strong national policy against race discrimination in housing leads the court to conclude that once a plaintiff has demonstrated the likelihood of success on the merits of a claim of housing discrimination, irreparable injury must be presumed. *See Banks v. Peek*, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part*, 473 F.2d 710 (6th Cir. 1973) (mem.). Second, the harm to the plaintiffs resulting from the defendants' interference with their right to equal housing opportunities far outweighs any injury that could result from an injunction that directs the defendants to do only what the law has long required of them. Finally, the issuance of an injunction in this case will certainly serve rather than disserve the public's strong interest in equality of housing opportunities.

C. Relief

The Court of Appeals for the Eleventh Circuit has recently reviewed the scope of injunctive relief available to a plaintiff who has demonstrated that a defendant has engaged in acts of housing discrimination.

> Once a court finds that a landlord has discriminated against prospective tenants, it may enjoin the landlord from engaging in such practices. 42 U.S.C.A. § 3610(d). The [FHA] also authorizes "such affirmative action as may be appropriate." *Id.* Injunctive relief should be structured to achieve the twin goals of insuring that the [FHA] is not violated in the future and removing any lingering effects of past discrimination.

> *United States v. Jamestown Center-in-the-Grove Apartments*, 557 F.2d 1079 (5th Cir. 1977). The relief must be tailored in each instance to the needs of the particular situation, a matter peculiarly within the discretion of the district judge.

Marable v. Walker, No. 82-7022, slip op. at 2918 (11th Cir. May 9, 1983).

As noted above, the facts adduced at the hearing on the plaintiffs' motion have not persuaded the court that the defendants should be enjoined from further rental of conventional apartments or that they should be required to rent a conventional apartment to Ms. Gresham on Section 8 terms. Further, because in this case injunctive relief is based on a finding of substantial likelihood, not a finding of fact at trial, that the defendants have discriminated, the court concludes that ordering similar relief as "affirmative action" would be premature. It is appropriate at this stage of the litigation to limit the scope of the preliminary injunction to insuring that the defendants will not persist in violating the FHA during the course of this action.

* * *

Accordingly, the plaintiffs' motion for preliminary injunctive relief is GRANTED IN PART and DENIED IN PART as set forth above.

It is therefore ORDERED that defendants Windrush Partners, Ltd., and Leo Management Company, their officers, employees, agents, and successors, and all persons acting in concert or participation with any of them, and in particular defendants Thomas L. Williams and Tina McGill, are ENJOINED from

(1) Discriminating against any person in the terms, conditions, or privileges of the rental of any apartment at Windrush Apartments because of race;

(2) Actively encouraging or soliciting any white person as a tenant at Windrush Apartments unless equal encouragement or solicitude is afforded to all black persons who inquire as to the availability of housing at Windrush Apartments; and

(3) Failing to display the required fair housing poster in a prominent location in each and every room at Windrush Apartments in which the defendants, their agents, and employees provide information about, answer inquiries in regard to, or receive applications for housing at Windrush Apartments.

Defendants shall forthwith fully instruct all of their agents and employees with respect to the provisions of this order. Further, the defendants shall, within ten (10) days of the date of entry of this order, inform the court of the steps they have taken to instuct all agents and employees in writing and orally in the provisions of this order and in the federal policy of nondiscrimination and fair housing.

IT IS SO ORDERED.

This, the 31st day of May, 1983.

RICHARD C. FREEMAN
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals

For the Eleventh Circuit

No. 83-8504

D.C. Docket No. C83-562A

**DERREAN GRESHAM and
METRO FAIR
HOUSING SERVICES,**

Plaintiffs-Appellees,

versus

**WINDRUSH PARTNERS, LTD., d/b/a
WINDRUSH APARTMENTS,
LEO MANAGEMENT COMPANY,
THOMAS L. WILLIAMS, and
TENA McGILL,**

Defendants-Appellants.

**Appeal from the United States District Court
for the Northern District of Georgia**

Before KRAVITCH and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is

hereby, amended in accordance with the opinion of this Court, and as amended is hereby, AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 27, 1984
For the Court: Spencer D. Mercer, Clerk

42 USCA § 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
R.S. § 1978.

42 USCA § 1437f. Lower-income housing assistance

Authorization for assistance payments

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section.

Authorization for contracts for assistance payments

(b)(1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) To the extent of annual contributions authorizations under section 1437c(c) of this title, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to con-

struct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners.

Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(c)(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 1439(a)(5) of this title. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative.

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

(3) The amount of the monthly assistance payment with respect to any dwelling unit, in the case of a large very low-income family, a very large lower income family, or a family with exceptional medical or other expenses, as determined by the Secretary, shall be the difference between 15 per centum of one-twelfth of the annual income of the family occupying the dwelling unit and the maximum monthly rent which the contract provides that the owner is to receive for the unit. In the case of other families, the Secretary shall establish the amount of the assistance payment as the difference between not less than 15 per centum nor more than 25 per centum of the family's income and the maximum rent, taking into consideration the income of the family, the number of minor children in the household, and the extent of medical or other unusual expenses incurred by the family. Reviews of family income shall be made no less

frequently than annually (except that such reviews may be made at intervals no longer than two years in the case of families who are elderly families).

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty days (A) in the event that a family vacates a dwelling unit before the expiration date of the lease for occupancy or (B) where a good faith effot is being made to fill an unoccupied unit, and, subject to the provisions of the following sentence, such payments may be made, in the case of a newly constructed or substantially rehabilitated project, after such sixty-day period in an amount equal to the debt service attributable to such an unoccupied dwelling unit for a period not to exceed one year, if a good faith effort is being made to fill the unit and the unit provides decent, safe, and sanitary housing. No such payment may be made after such sixty-day period if the Secretary determines that the dwelling unit is in a project which provides the owner with revenues exceeding the costs incurred by such owner with respect to such project.

(5) Assistance payments may be made with respect to up to 100 per centum of the dwelling units in any structure upon the application of the owner or prospective owner. Within the category of projects containing more than fifty units and designed for use primarily by nonelderly and nonhandicapped persons, the Secretary may give preference to applications for assistance involving not more than 20 per centum of the dweling units in a project. In according any such preference, the Secretary shall compare applications received during distinct time periods not exceeding sixty days in duration.

(6) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

(7) At least 30 per centum of the families assisted under this section with annual allocations of contract authority shall be very low-income families at the time of the initial renting of dwelling units.

(8) To the extent authorized in contracts entered into by the Secretary with a public housing agency, such agency may purchase any structure containing one or more dwelling units assisted under this section for the purpose of reselling the structure to the tenant or tenants occupying units aggregating in value at least 80 per centum of the structure's total value. Any such resale may be made on the terms and conditions prescribed under section 1437c(h) of this title and subject to the limitation contained in such section.

Required provisions and duration of contracts for assistance payments

(d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that—

(A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency;

(B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy;

(C) maintenance and replacement (including redecoration) shall be in accordance with the standard practice for the building concerned as established by the owner and agreed to by the agency; and

(D) the agency and the owner shall carry out such other appropriate terms and conditions as may be mutually agreed to by them.

(2) Each contract for an existing structure entered into under this section shall be for a term of not less than one month nor more than one hundred and eighty months.

(3) Notwithstanding any other provision of law, with the approval of the Secretary the public housing agency administering a contract under this section with respect to existing housing units may exercise all management and maintenance responsibilities with respect to those units pursuant to a contract betwen such agency and the owner of such units.

Restrictions on contracts for assistance payments

(e)(1) The Secretary shall not contract to make assistance payments with respect to a newly constructed or substantially rehabilitated dwelling unit for a term of less than one month or more than three hundred and sixty months, except that such term may not exceed two hundred and forty months in the case of a project financed with assistance of a loan made by, or insured, guaranteed or intended for purchase by, the Federal Government, other than pursuant to section 1715z-9 of Title 12. Notwithstanding the preceding sentence, in the case of a project owned by, or financed by a loan or loan guarantee from, a State or local

agency or the Farmers' Home Administration, the term may not exceed four hundred and eighty months.

(2) The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwelling units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities). In approving any public housing agency to assume all the management and maintenance responsibilities of any dwelling unit under the preceding sentence, the Secretary may do so without regard to whether such agency administers the housing assistance payment contract for that unit.

(3) The construction or substantial rehabilitation of dwelling units to be assisted under this section shall be eligible for financing with mortgages insured under the National Housing Act. Assistance with respect to such dwelling units shall not be withheld or made subject to preferences by reason of the availability of mortgage insurance pursuant to section 224 of such Act or by reason of the tax-exempt status of the bonds or other obligations to be used to finance such construction or rehabilitation.

(4) Nothing in this chapter shall be deemed to prohibit an owner from pledging, or offering as security for any loan or obligation, a contract for assistance payments entered into pursuant to this section: *Provided,* That such security is in connection with a project constructed or rehabilitated pursuant to authority granted in this section, and the terms of the financing or any refinancing have been approved by the Secretary.

Definitions

(f) As used in this section—

(1) the term "lower income families" means those families whose incomes do not exceed 80 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of his findings that such variations are necessary because of prevailing levels of construction costs, unusually high or low family incomes, or other factors;

(2) the term "very low-income families" means those families whose incomes do not exceed 50 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families;

(3) the term "income" means income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary;

(4) the term "owner" means any private person or entity, including a cooperative, or a public housing agency, having the legal right to lease or sublease newly constructed or substantially rehabilitated dwelling units as described in this section;

(5) the terms "rent" or "rental" mean, with respect to members of a cooperative, the charges under the occupancy agreements between such members and the cooperative; and

(6) the term "debt service" means the required payments for principal and interest made with respect to a mortgage secured by housing assisted under this chapter.

Regulations applicable for implementation of assistance payments

(g) Notwithstanding any other provision of this chapter, assistance payments under this section may be provided, in accordance with regulations prescribed by the Secretary, with respect to some or all of the units in any project approved pursuant to section 1701q of Title 12.

Nonapplicability of inconsistent provisions to contracts for assistance payments

(h) The provisions of sections 1437a(1), 1437c(e), and 1437d of this title, and any other provisions of this chapter, which are inconsistent with the provisions of this section shall not apply to contracts for assistance entered into under this section.

Sept. 1, 1937, c. 896, § 8, as added Aug. 22, 1974, Pub.L. 93-383, Title II, § 201(a), 88 Stat. 662, and amended Aug. 3, 1976, Pub.L. 94-375, § 2(d), (e), (g), 90 Stat. 1068; Apr. 30, 1977, Pub.L. 95-24, Title I, § 101(c), 91 Stat. 55; Oct. 12, 1977, Pub.L. 95-128, Title II, § 201(c)-(e), 91 Stat. 1128.

42 USCA § 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in

the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

Pub.L. 90-284, Title VIII, § 804, Apr. 11, 1968, 82 Stat. 83; Pub.L. 93-383, Title VIII, § 808(b)(1), Aug. 22, 1974, 88 Stat. 729.

24 CFR § 200.620 Requirements

With respect to all FHA subsidized or unsubsidized programs in which the applicant hereafter participates (except for housing for which a conditional commitment has been issued prior to the effective date of these regulations), the applicant shall meet the following requirements or, if he contracts marketing responsibility to another party, be responsible for that party's carrying out the requirements:

(a) Carry out an affirmative program to attract buyers or tenants, regardless of sex, of all minority and majority groups to the housing for initial sale or rental. An affirmative marketing program shall be in effect for each multifam-

ily project throughout the life of the mortgage. Such a program shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex or national origin, through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area. All advertising shall include either the Department-approved Equal Housing Opportunity logo or slogan or statement and all advertising depicting persons shall depict persons of majority and minority groups, including both sexes.

(b) Maintain a nondiscriminatory hiring policy in recruiting from both minority and majority groups, including both sexes, for staff engaged in the sale or rental of properties.

(c) Instruct all employees and agents in writing and orally in the policy of nondiscrimination and fair housing.

(d) Specifically solicit eligible buyers or tenants reported to the applicant by the Area or Insuring Office.

(e) Prominently display in all offices in which sale or rental activity pertaining to the project or subdivision takes place the Department-approved Fair Housing Poster and include in any printed material used in connection with sales or rentals, the Department-approved Equal Housing Opportunity logo or slogan or statement.

(f) Post in a conspicuous position on all FHA project sites a sign displaying prominently either the Department-approved Equal Housing Opportunity logo or slogan or statement.

[37 FR 75, Jan. 5, 1972, as amended at 40 FR 20080, May 8, 1975; 40 FR 53008, Nov. 14, 1975]

24 CFR § 200.625 Affirmative fair housing marketing plan.

Each applicant for participation in FHA housing programs to which these regulations apply shall provide on a form to be supplied by the Department information indicating his affirmative fair housing marketing plan to comply with the requirements set forth in § 200.620. This form, once approved by HUD, will be available for public inspection at the sales or rental offices of the applicant.

24 CFR § 110.30 Effect of failure to display poster.

Any person who claims to have been injured by a discriminatory housing practice may file a complaint with the Secretary pursuant to Part 105 of this chapter. A failure to display the fair housing poster as required by this part shall be deemed prima facie evidence of a discriminatory housing practice.

Rule 65. Injunctions

(a) Preliminary injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of hearing with trial on merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary restraining order; notice; hearing; duration.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security.

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and scope of injunction or restraining order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and employee; interpleader; constitutional cases.

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-166

Office-Supreme Court, U.S.
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WINDRUSH APARTMENTS, LTD.
d/b/a WINDRUSH APARTMENTS, LEO MANAGEMENT
COMPANY, THOMAS L. WILLIAMS,
and TENA McGILL,

Petitioners,

v.

DERREAN GRESHAM and METRO FAIR HOUSING
SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT METRO FAIR HOUSING SERVICES' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A concise statement of the facts of the case appears in the decision of the Eleventh Circuit at A-3-12 of petitioners' petition. Petitioners have not contested any of the findings of fact of the district court in this petition.

ARGUMENT

The principle on which the district court's grant of a preliminary injunction rests - that irreparable injury may be presumed from the fact of proven discrimination in violation of the fair housing statutes - is well settled in decisions of this and other courts. The decision of the Eleventh Circuit affirming the district court creates no conflicts with any decisions of this or other courts, and raises no new issues appropriate for review by this Court.

The decision of the Eleventh Circuit affirming the district court amply demonstrates the consistency of its analysis with settled law and merits quotation at some length.

> We agree with the district court that irreparable injury may be presumed from the fact of discrimination and violations of the fair housing statutes. In United States v. Hayes International Corporation, 415 F.2d 1038, 1045 (5th Cir. 1969), the old Fifth Circuit held that, "Where . . . an injunction is authorized by statute and the statutory conditions are satisfied . . . 'the usual prerequisite of irreparable

injury need not be established and the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury before obtaining an injunction. " [citations and footnote omitted]. The Hayes International court went on to state that "irreparable injury should be presumed from the very fact that the statute has been violated." Id; accord Atchinson, Topeka and Santa Fee Railway Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981); Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 123, 128 (D. Conn. 1982); U.V. Industries, Inc. v. Posner, 466 F. Supp. 1251, 1255-56 (D. Maine, 1979); 7 Moore's Federal Practice, §65.04(1)n. 7b. In the case at hand the district court found certain specific violations of the regulations implementing the Fair Housing Act. The Act and its regulations prohibit certain discriminatory practices without regard to their actual effect on the community. We hold that when a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction remedying those violations. See e.g., TOPIC v. Circle Realty, 377 F. Supp. 111, 114 (C.D. Cal. 1974), rev'd on other grounds, 532 F.2d 1273 (9th Cir. 1975), cert. denied, 429 U.S. 859, 97 S. Ct. 160, 50 L.Ed. 2d 137 (1976).

A-14-15.[1/]

In addition, however, the Eleventh Circuit emphasized that a finding of irreparable injury is a natural consequence of proven housing discrimination.

> . . . Several reasons explain why housing discrimination results in irreparable injury. First, a person who is discriminated against in the search for housing cannot remain in limbo while a court resolves the matter. He or she must find housing elsewhere, and once that housing is found, even if in a segregated neighborhood, it becomes difficult to disrupt new friendships and other community ties by uprooting oneself again.
>
> Second, in a case such as this one, the available housing where the discrimination is occurring could become filled during the pendency of a lawsuit, making corrective relief nearly impossible to enter - clearly, a court lacks the authority to order innocent white tenants to vacate apartments to remedy discrimination against blacks or other minorities by the apartment management. Thus preliminary injunctive relief may be necessary to insure that a remedy will be available. Third, monetary relief cannot correct the injury

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1/ Title VIII expressly authorizes the issuance of a permanent or temporary injunction upon a finding of violation of the prohibitions of the statute. See 42 U.S. C §3612(c).

completely. In Banks v. Perk, the court recited a litany of irreparable harm that occurs whenever housing discrimination occurs. That harm included, " the loss of safe, sanitary, decent and integrated housing, the loss of achieving integrated schools without the necessity of massive busing, the loss of housing which is accessible to jobs; and the loss of being unable to escape the neverending and seemingly unbreakable cycle of poverty. " 341 F. Supp. at 1185. See also Zuch v. Hussey, 394 F. Supp. 1028, 1052 (E.D. Mich., 1975) ("Steering" and "blacklisting" practices of real estate agents in Detroit area cause irreparable harm). Additionally as plaintiffs have asserted in this case housing discrimination causes irreparable injury by denying whites, as well as blacks, the benefits of living in an integrated community.

In sum, we hold that because of the subtle, pervasive, and essentially irremediable nature of racial discrimination, proof of the existence of discriminatory housing practice is sufficient to permit a court to presume irreparable injury. There being no evidence in the record tending to rebut this presumption we affirm the district court's conclusion that preliminary relief was appropriate in this case.

A-16-17.

The Eleventh Circuit's ruling is consistant with well-established decisions of this Court. See, U.S. v. San Francisco, 310 U.S. 16, 30 (1940), cited in Atchison, Topeka and Santa Fe Railway Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981); and Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944). See also Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); and other cases cited in 7 Moore's Federal Practice, §65.04(1)n. 7b.

The injunction issued by the district court as modified by the 11th Cir. is reasonable in form and scope. There is no issue appropriate for review by this Court. That injunction is designed to correct specific practices of defendants found to violate the prohibitions of Title VIII. See A-8-12; 17-18.

CONCLUSION

For all the reasons stated, the petition should be denied.

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I, LOWELL JOHNSTON, Attorney for Respondent Metro Fair Housing Services herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of ~~July~~ Sept., 1984, I served copies of the foregoing Brief in Opposition on the several parties hereto as follows:

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